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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

Donte Bell,

Plaintiff,

vs.

National Credit Systems, Inc.; Assurant, Inc.
(a/k/a Sure Deposit); Equifax Information
Services, LLC; Experian Information
Solutions, Inc.; and Trans Union, LLC,

Defendants.

Case No.: 2:19-cv-01727-RAJ-BAT

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S OBJECTIONS TO
MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION**

I. INTRODUCTION

Plaintiff hereby requests that this Court overrule Defendant's Objections to the Magistrate Judge's Report and Recommendation and adopt the well-reasoned opinion of Magistrate Judge Tsuchida. Plaintiff further requests that, in addition to the attorney's fees awarded to the Plaintiff by the Magistrate, this Court award attorney's fees for the time required to respond Defendant's current objections.

II. ARGUMENT

Continuing its pattern of deliberately wasting this Court and Plaintiff Donte Bell's ("Mr. Bell" or "Plaintiff") time, Defendant National Credits Systems, Inc. ("Defendant or "NCS") has filed objections to the well-reasoned and legally sound decision of Magistrate Judge Tsuchida in rejecting NCS's request for sanctions and in declining to treat NCS's motion as a motion to dismiss. Defendant's original motion was a nesting

1 doll of improperly presented arguments and documents. In essence, Defendant filed a
2 motion for summary judgment (before the close of discovery, and twenty minutes *before*
3 Plaintiff's deposition of NCS), masquerading as motion to dismiss (relying on a gigantic
4 amount of unvetted documentary "evidence"), masquerading as a motion for sanctions
5 (which failed to comply with the Fed. R. Civ. P.). This is clearly an inappropriate course
6 of conduct, and the Magistrate was correct in awarding Plaintiff attorney's fees for the
7 time required of Plaintiff to respond to the Defendant's spurious allegations and improper
8 use of a Rule 11 motion.

9 "The standard under which the District Court reviews a Magistrate Judge's
10 decision is a highly deferential one." *L.H. v. Schwarzenegger*, No. CIV. S-06-2042
11 LKK/GGH, at *11 (E.D. Cal. July 6, 2007). If a party objects to a non-dispositive pretrial
12 ruling by a magistrate judge, the district court will review or reconsider the ruling under
13 the "clearly erroneous or contrary to law" standard. Fed.R.Civ.Pro. 72(a); *Osband v.*
14 *Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002); *Grimes v. City of San Francisco*, 951
15 F.2d 236, 240-41 (9th Cir. 1991). A magistrate judge's factual findings are "clearly
16 erroneous" when the district court is left with the definite and firm conviction that a
17 mistake has been committed. *Security Farms v. International Bhd. of Teamsters*, 124
18 F.3d 999, 1014 (9th Cir. 1997); *Green v. Baca*, 219 F.R.D. 485, 489 (C.D. Cal. 2003).
19 "An order is contrary to law when it fails to apply or misapplies relevant statutes, case
20 law, or rules of procedure." *Knutson v. Blue Cross Blue Shield of Minn.*, 254 F.R.D. 553,
21 556 (D. Minn. 2008); *Rathgaber v. Town of Oyster Bay*, 492 F.Supp.2d 130, 137 (E.D.
22 N.Y. 2007); *Surles v. Air France*, 210 F.Supp.2d 501, 502 (S.D. N.Y. 2001); see *Adolph*
23 *Coors Co. v. Wallace*, 570 F.Supp. 202, 205 (N.D. Cal. 1983).

25 Defendant brought a "Motion for Attorneys' Fees, Costs and Sanctions" pursuant
26 to Fed. R. Civ. P. 11. Doc. 82. In that motion, it sought not only sanctions and attorney's
27 fees but dismissal of Mr. Bell's Second Amended Complaint (Doc. 59) in its entirety. As
28 Magistrate Judge Tsuchida correctly noted, "NCS's decision to use a Rule 11 motion to
29 legally attack the substance of Mr. Bell's entire complaint, while personally attacking
30 Plaintiff and his counsel, was ill advised and reckless." Doc. 87 at 13. A rule 11 motion

1 is appropriate only in the “rare and exceptional case where the action is clearly frivolous,
2 legally unreasonable or without legal foundation, or brought for an improper purpose.”
3 Fed. R. Civ. P. 11. See also *Operating Eng's Pension Trust v. A-C Co.*, 859 F.2d 1336,
4 1344 (9th Cir. 1988)). Thus, the inquiry here is not, and should not be, whether Plaintiff
5 will or even whether he can ultimately prevail in proving his case; rather, the inquiry is
6 whether the allegations in Plaintiff’s complaint are an objectively unreasonable use of the
7 Court system. As Magistrate Tsuchida correct stated:

8 NCS’s decision to cloak a motion to dismiss on the merits in
9 the guise of a Rule 11 motion, does further violence to the
10 purpose behind the FCRA (“to protect consumers against
11 inaccurate and incomplete credit reporting...” *Gorman*, 584
12 F.3d at 1155–56), and fully realizes the Supreme Court’s
13 stated concern that Rule 11 motions “spawn satellite litigation
14 and chill vigorous advocacy...”. *Cooter & Gell*, 496 U.S. at
15 393.

16 Doc. 87 at 13-14.

17 Even now, in objecting to the Magistrate’s ruling, Defendant seems to
18 misapprehend the purpose of a Rule 11 sanctions motion. NCS spends the bulk of its
19 objections arguing the merits of Plaintiff’s allegations and case, based on a self-serving,
20 unauthenticated version of the facts of the case, where the extrinsic documents would be
21 unavailable to support a motion to dismiss in any event. If NCS wished to assert that
22 Plaintiff’s allegations are insufficient to support his claims even if proven to be true, NCS
23 could have filed a motion to dismiss. It did not. If NCS wished to assert that the evidence
24 does not support the allegations and Plaintiff thus cannot prove his case, NCS could file a
25 motion for summary judgment. It has not.

26 Even as NCS states that it does “not dispute the law cited by the Magistrate as to
27 what would need to be proven to find a violation of the FCRA,” [Doc. 89 at 2], it continues
28 to argue the merits of Plaintiff’s allegations and the existence or non-existence of
29 evidence. That is *not* the purpose of a motion under Rule 11.

30 It appears from the initial motion for sanctions, NCS’s reply brief in support of that
motion, and the instant objections to the Magistrate’s ruling, that Defendant believes it is
entitled to have Plaintiff accept NCS’s version of facts as true and demands that Plaintiff

1 “provide a basis for their continued efforts in this matter.” Doc. 84 at 4. First, it is not
2 Plaintiff, but NCS that continues to vexatiously multiply proceedings in this matter, again
3 forcing Plaintiff to respond to another ill-conceived NCS filing. Second, the allegations in
4 the complaint speak for themselves, as will the evidence when it becomes the appropriate
5 time and place to present that evidence, including copies of Plaintiff’s credit reports
6 showing NCS’s reporting exactly as alleged in his complaint. Defendant is not entitled to
7 have the Plaintiff lay out in meticulous detail how he will someday prove his case, and the
8 Defendant is certainly not entitled to sanctions and attorneys’ fees because it believes
9 Plaintiff did not give a detailed enough preview of his case.

10 Defendant’s repeated contention that Plaintiff is wasting the Court’s time by
11 pursuing frivolous claims is a case of the pot calling the kettle black. The only objectively
12 unreasonable conduct in this case, wasteful of the Court’s time, is the filing by Defendant
13 of a frivolous Rule 11 motion, improperly attaching hundreds of pages of documents to
14 that motion, and now objecting to the Magistrate’s thorough fourteen (14) page opinion
15 denying NCS’s motion and explaining its reasoning. This component of the litigation is
16 the waste of time, not Plaintiff’s case in chief. If Defendant’s position is correct (that
17 “Plaintiff is maintaining his suit in bad faith, knowing that his claims are without merit”
18 Doc. 84 at 5.), then it should have no trouble proving that by means of a summary
19 judgment motion or at trial. However, NCS instead chose to forego such a process, well
20 established by the federal rules, and ask the Court for sanctions before even filing a motion
21 to dismiss or motion for summary judgment.
22

23 As Magistrate Tsuchida explained:

24 The Court agrees that NCS has unreasonably multiplied the
25 proceedings in this case by asking for a dismissal on the merits
26 of Mr. Bell’s complaint through a Rule 11 motion. Counsel
27 should know that Rule 11 is not the vehicle to obtain a
28 judgment on the merits as it applies only to the signing of a
29 pleading or motion and when evaluating the pleading, the
30 Court looks objectively at the attorney’s conduct at the time
of signing. *Community Elec. Serv. v. National* 869 F.2d 1235,
1243 (9th Cir.), *cert. denied*, 493 U.S. 891, 110 S.Ct. 236, 107
L.Ed.2d 187 (1989). Moreover, even when a Rule 11 violation
has been shown, sanctions are not automatic and are to be

1 compensatory rather than punitive in nature. *Elec. Contractors*
2 *Ass'n, Inc.*, 869 F.2d 1235, 1243 (9th Cir.), *cert. denied*, 493
3 U.S. 891, 110 S.Ct. 236, 107 L.Ed.2d 187 (1989). Moreover,
4 even when a Rule 11 violation has been shown, sanctions are
5 not automatic and are to be compensatory rather than punitive
6 in nature. [Doc. 87 at 13].

7 Further, NCS followed Plaintiff's Objection [Doc. 83] with a Reply [Doc. 84]
8 which then improperly raised new allegations (and attached an additional 106 pages of
9 unverified documents), requiring Plaintiff to respond with a Surreply refuting the five new
10 allegations NCS brought forth only in its Reply. Doc. 86. NCS based its original motion
11 for sanctions (and Order to dismiss all claims) *solely* on its belief in the merits of the
12 case—that "Plaintiff's claims are not warranted by existing law or by a non-frivolous
13 argument for extending, modifying, or reversing existing law or for establishing new law,
14 and are not grounded in law or fact, and therefore violate Fed. R. Civ. P. 11." [Doc. 82 at
15 1].

16 In NCS's Reply, and now in its Objection, NCS newly (and falsely) alleges that it
17 brings a motion for sanctions because Plaintiff has "been asked numerous times to provide
18 a basis for [his] continued efforts in this matter – with no response." Doc 84 at 4.
19 Defendant then goes on to make arguments which belong in a motion for summary
20 judgment, and which Magistrate Tsuchida already disregarded in his Report and
21 Recommendation.

22 [T]he Court declines to consider new arguments raised by
23 NC[S] in its reply (attempts to settle, discovery issues, vague
24 references to a deposition, and a conclusory and unsupported
25 claim that the Privacy Guard credit report does not actually
26 contain information from Trans Union, Equifax, and
27 Experian). See Dkt. 84.

28 Doc. 87 at 11.

29 Magistrate Tsuchida's thoroughly considered Report and Recommendation
30 accurately exposed NCS's ill-presented motion as an attempt to circumvent the norms of
the federal rules. "Disagreeing on the facts and applicable law is not grounds for
sanctions." Doc. 87 at 10. If there is a frivolous, non-meritorious filing in this case, it is
from NCS in improperly attempting to file for summary judgment (or a motion to dismiss)

1 in the guise of a motion for sanctions, and then to triple down on the very behavior for
2 which NCS was admonished by the Magistrate (improper extrinsic evidence,
3 contravention of federal rules, and recklessness). Doc. 87 at 10-14.

4 **III. CONCLUSION**

5 For the forgoing reasons, Defendant's objections should be overruled, the
6 Magistrate's decision should be upheld, and Plaintiff should be awarded further attorney's
7 fees for being forced to respond to Defendant's spurious objections.

8 RESPECTFULLY SUBMITTED,
9

10 DATED: November 17, 2020

11 /s/Dawn M. McCraw

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on November 17, 2020, I electronically filed the foregoing with
23 the Clerk of the Court using the ECF system, which will send notice of such filing to all
24 attorneys of record in this matter.

25
26 /s/Jacey Gutierrez
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